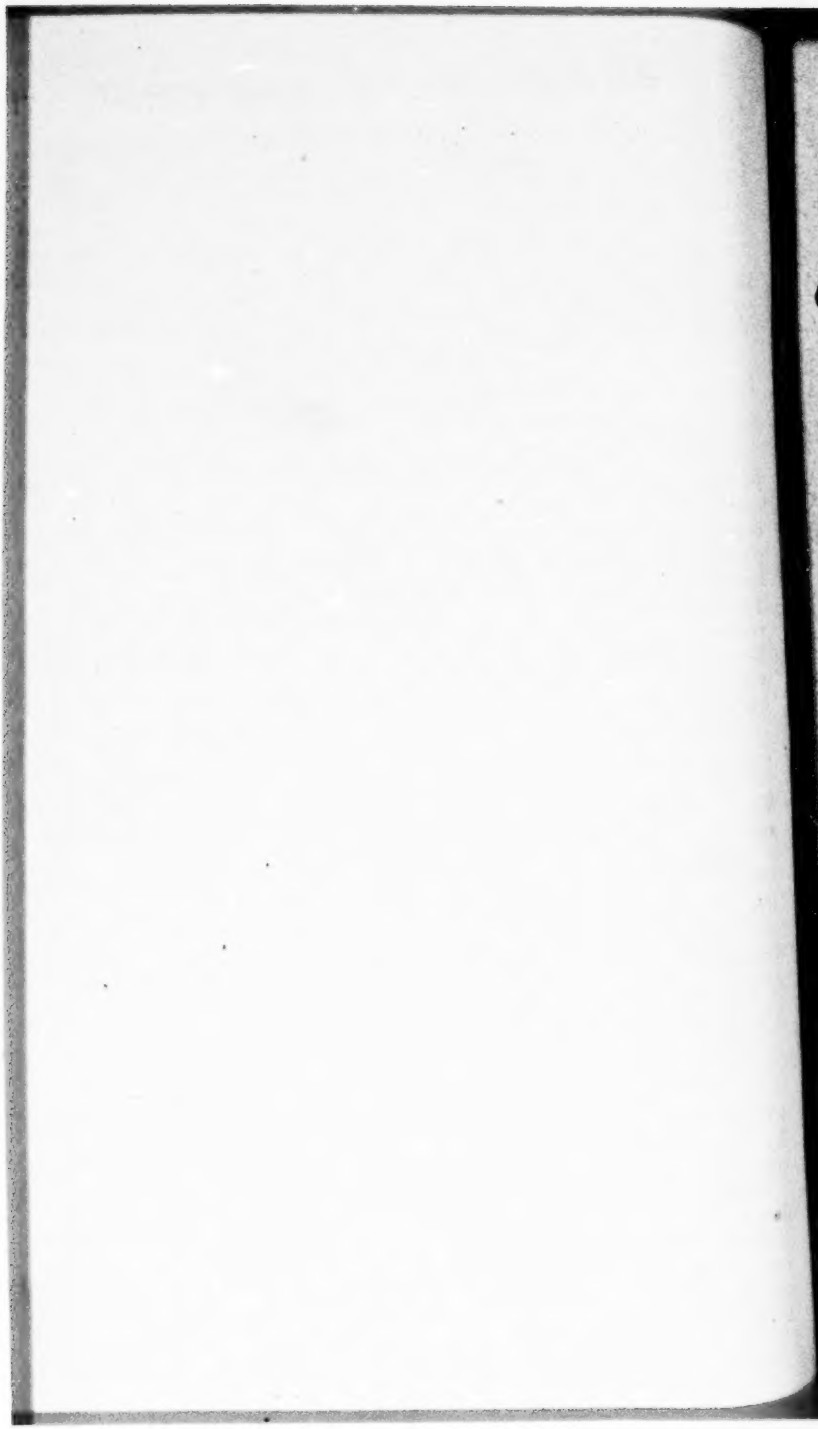

No. 489

NOV 15 1902
JAMES H. McKENNEY,
Clerk.

SUPREME COURT

Motion to Advance

OF [redacted].

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK, AND THE RAPID TRANSIT RAILROAD COMPANY,

Complainants and Appellants,

against

Filed Nov. 15, 1902.

THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually, and as Mayor of the City of New York; BIRD S. COLER, individually, and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH, and MORRIS K. JESSUP, individually, and as members of the pretended Board of Rapid Transit Commissioners of the City of New York; JOHN B. MC DONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,

Defendants and Respondents.

MOTION TO ADVANCE,

NOTICE, AND [redacted] AFFIDAVIT.

ROGER FOSTER,
Counsel for Complainants and Appellants
35 Wall Street,
New York City.

GEORGE L. RIVES,
Corporation Counsel, Solicitor for the Defendants, the City of New York and Others.

EDWARD M. SHEPARD and
BOARDMAN, PLATT and SOLEY,
Solicitors for the Defendants, the Board of Rapid Transit Commissioners, Alexander E. Orr and Others.

NICOLL, ANABLE and LINDSAY,
Solicitors for the Defendant, John B. McDonald.

STRONG and CADWALADER,
Solicitors for the Defendant, the Rapid Transit Subway Construction

SUPREME COURT

OF THE UNITED STATES.

THE UNDERGROUND RAILROAD of the City of New York, and the RAPID TRANSIT RAILROAD COMPANY,

Complainants Appellants,

against

THE CITY OF NEW YORK, ROBERT A. VANWYCK, individually, and as Mayor of the City of New York; BIRD S. COLER, individually and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH and MORRIS K. JESSUP, individually, and as members of the pretended Board of Rapid Transit Commissioners of the City of New York; JOHN B. MCDONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,

Defendants and Respondents.

And now come the appellants, the Underground Railroad of the City of New York, and the Rapid Transit Railroad Company, by Roger Foster, their

counsel, and move this court on the affidavit of James M. Fisk, sworn to on November 20th 1902, and upon the transcript, which has been previously filed herein, and upon all the papers in the proceedings herein, for an order advancing this case and setting it down for oral argument some day during the months of December, 1902, or January, 1903, and for such other and further relief in the premises as may to this Court seem just and meet.

Dated, New York, December 1st, 1902.

ROGER FOSTER,
Counsel for Appellants,
35 Wall Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD of the City of New York, and the RAPID TRANSIT RAILROAD COMPANY,
Complainants and Appellants,
against
THE CITY OF NEW YORK, ROBERT A. VANWYCK, individually, and as Mayor of the City of New York; BIRD S. COLER, individually, and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH, and MORRIS K. JESSUP, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York; JOHN B. MCDONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants and Respondents.

Sirs:

Please take notice that the Underground Railroad of the City of New York and the Rapid Transit Railroad Company, the above named appellants, by Roger Foster, their attorney will, on the first Monday of December, 1902, move the Supreme Court of the United State, upon the affidavit of James M. Fisk, sworn to on November 20th 1902, and upon the transcript which has been previously filed herein, and upon all the papers in the proceedings herein, for an order advan-

cing this cause and setting it down for oral argument upon some day during the months of December, 1902, or January, 1903, and for such other and further relief as to this Court may seem just and meet.

New York, November 10th 1902.

ROGER FOSTER,
Counsel for Appellants,
35 Wall Street,
New York City.

To

George L. Rives, Esq.,
Corporation Counsel,
Solicitor for the defendants the
City of New York and Others;

Edward M. Shepard, Esq., and Messrs.
Boardman, Platt and Soley,
Solicitors for the defendants, the
Board of Rapid Transit Commissioners;
Alexander E. Orr, and Others.

Messrs. Nicoll, Anable and Lindsay,
Solicitors for the defendant, John
B. McDonald;

Messrs. Strong and Cadwalader,
Solicitors for the defendant, the Rapid
Transit Subway Construction Company.

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD of the City of New York, and the RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants and Appellants,
against
THE CITY OF NEW YORK, ROBERT A. VANWYCK, individually, and as Mayor of the City of New York; BIRD S. COLER, individually, and as Comptroller of the City of New York; ALEXANDER E. ORR (sued as Albert E. Orr), JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH, (sued as Charles L. Smith), MORRIS K. JESSUP, individually, and members of Rapid Transit Commissioners of the City of New York; JOHN B. MCDONALD, and the RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants and Respondents.

State of New York, County of New York, ss:

James M. Fisk, being duly sworn, deposes and says: I reside in the City of Newark, County of Essex, State of New Jersey, having an office at No. 93-99 Nassau Street, New York City, and I appeared in the Circuit Court of the United States, for the Southern District of New York, as solicitor for the appellants herein who were the complainants below, in the above case by the Underground Railroad of the City of New York and another against the City of

New York and others, which is now pending in this Court, duly docketed on or about October 25th, 1902, No. 489, of the October Term of 1902. The said complainants, through me as their solicitor, filed a bill in Equity in said Circuit Court of the United States for the Southern District of New York, on or about July
16 5th, 1901. The defendants demurred to said bill on several grounds. After several adjournments obtained by the defendants, against my opposition, said demurrers were argued on or about April 8th, 1902. On or about August 18th, 1902, a decree was made dismissing said bill for want of jurisdiction the question of jurisdiction was duly certified to this Court. Said question of jurisdiction is as follows:

"(1). When a Circuit Court of the United States decides that the complainant to a bill of Equity brought to enforce an alleged right which he claims arises under the Constitution of the United States
17 shows no right arising under the Constitution of the United States, has said Court jurisdiction to decide and hear and determine other matters of equitable cognizance pleaded in said bill which do not arise under either the Constitution of the United States, or a statute or treaty thereof if the complainant and defendant are citizens of the same state?

(2). Has this Court jurisdiction of the said amended bill in Equity?"

The appellants have duly appeared and entered their appearance by Roger Foster as their counsel, and upon information and belief that the respondents have not
18 appeared in this Court, but the following appearances were made in the Circuit Court of the United States for the Southern District of New York: The City of New York, by George L. Rives, as Corporation Counsel, of the City of New York; Robert A. VanWyck, individually, and as Mayor of the City of New York; Bird S. Coler, individually, and as Comptroller of the City of New York; Alexander E. Orr (sued as Albert

E. Orr), John H. Starin, Woodbury Langdon, George L. Rives, Charles S. Smith (sued as Charles L. Smith), Morris K. Jessup, individually and as members of the Board of Rapid Transit Commissioners of the City of New York, by Edward M. Shepard, Esq., and Messrs. Boardman, Platt & Soley; John B. McDonald, by Messrs. Nicoll, Anable & Lindsay; and the Rapid Transit Subway Construction Company, by Messrs. Strong & Cadwalader. The complainants below have duly appealed to this Court from said decree, and they have based their appeal upon the ground that the Court had not jurisdiction of the case and upon the further ground that the case involves the construction of the Constitution of the United States, and is a case in which a law of the State of New York is claimed to be in contravention of the Constitution of the United States. 19

The prayer of said bill is for an injunction against the continuance of the construction by the City of New York, with the aid of the other defendants of an underground railroad under color of a Statute of the State of New York, known as the Rapid Transit Act; and to enjoin the payment by said City and officers of any money under color of said Rapid Transit Act, and from carrying out a contract for such construction which is designated as the Rapid Transit Contract and for other relief. 20

The bill claims that the said Rapid Transit Act of 1897, namely Chapter 4 of the laws of 1891, of the State of New York, as subsequently amended, is a violation and an infringement of the Constitution of the United States for several reasons, amongst others the following: That it impairs the obligations of certain contracts made by the State of New York with the complainants, under which the complainants have obtained an exclusive right to construct an underground railroad upon the land and route whereupon the defendants are constructing the railroad described 21

in said bill. That the said statute authorizes the expenditure of public money and taxes paid by the complainants for a private use and thus takes complainants property without due process of law. That said statute authorizes the expenditure of money of the City of New York, and of taxes paid by the complainants by
22 municipal officers, who are neither elected by the people nor appointed by other public authorities, who have been elected by the survivors of the Rapid Transit Commissioners, originally appointed by said statute, to fill vacancies in said commission and that complainants property is thus taken without due process of law; and that said statute in several other particulars violates the Constitution of the United States.

Said bill further alleges, and it is admitted by said demurrers, that the City of New York is insolvent and has already more indebtedness than is authorized by the Constitution of the State of New York; that the
23 said City proposes to incur additional indebtedness, for the construction of said underground railroad, which will be unauthorized and void; and that it has no means with which to pay for the private properey which it proposes to take in the construction of said raliroad. The said bill further alleges, and it is admitted by the demurrers, that said Rapid Transit Contract was obtained by fraud and undue influence which is described in said bill, and that said contract is void for that reason.

The questions of law which arise upon said bill are numerous, difficult and complicated, and of great public
24 importance; and it is my belief that it will be impossible for counsel to present them upon printed briefs without an oral agreement in such a manner as adequately to protect the rights of the complainants and to relieve the Court of useless labor when rendering its decision.

The question whether the City of New York has exceeded its debt limit, as prescribed by the constitution of said State, has been considered by the Appellate

Division of that State for the First Department, In the Matter of the Application of the Board of Rapid Transit Railroad Commissioners of New York, etc., 5 App. Div. 290, 294, 297, and In the Matter of the Application of the Board of Rapid Transit Railroad Commissioners, etc., 23 App. Div. 472, 475-486. At least two of the Justices of said Court, namely, Mr. Justice Rumsey and Mr. Justice Ingraham, then expressed their opinion that the indebtedness incurred by the construction of said underground railroad would necessarily exceed said debt limit, and Presiding Justice Van Brunt seemed to be of the same opinion. A majority of said Court, however, considered that the decision of this point was then unnecessary. The New York Court of Appeals has never passed upon that question. 25

In the case of the Sun Printing and Publishing Co. vs. The Mayor, etc., of the City of New York, 152 New York, 257, the New York Court of Appeals passed upon certain objections to the constitutionality of said Rapid Transit Act which were founded upon the Constitution of the State of New York, but none of the constitutional questions above specified by me have ever been passed upon by said Court of Appeals. 26

The interests of the complainants and the public interest both demand an immediate hearing of and disposition of this appeal. Pending this suit the defendants have continued the construction of the said underground railroad and the City of New York has expended for that purpose several millions of dollars, and defendants are about to expend out of the municipal funds of said City much more money in order to defray the expenses of said construction. The complainants offered in said bill, if their rights are enforced and protected, to pay to the City of New York, all the money it has advanced for said construction. The interests of the City of New York, and of persons dealing in its bonds demand that the questions raised by 27

this bill be decided as speedily as may be. Some of the defendants have announced in public print in the City of New York that they expect to commence operation of the said underground railroad during the year 1903, under a lease of the same, provision for which is made in said Rapid Transit Contract. It is important to protect the rights of the complainants and of the City of New York, that before that time the person legally entitled to operate said railroad should be ascertained by a speedy adjudication of this Court. If this case is heard in its regular order it cannot be reached and decided before the early part of the year 1904, as I am informed and believe.

JAMES M. FISK.

Sworn to before me November 20th, 1902.

D. McLean Shaw

Notary Public.

(Notarial Seal).

13731

FILE COPY.

Supreme Court of the United States.

October Term 1902 No. 150.

18,717.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants, Appellants,
against
THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually and as Mayor of the City of New York; BIRD S. COLER, individually and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH, AND MORRIS K. JESSUP, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York, JOHN B. MCDONALD AND THE RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants, Respondents.

Office Supreme Court U. S.
FILED
APR 13 1903
JAMES H. McKENNEY,
Clerk.

Dear Sirs:

PLEASE TAKE NOTICE that on Monday, April 20, 1903, or if this Court is not then in session, on the next succeeding motion day thereof, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard in the Capitol at Washington in the District of Columbia, I shall submit the above entitled appeal

to the Supreme Court of the United States upon the question of the jurisdiction of the Circuit Court of the United States for the Southern District of New York, over the bill in equity herein filed in said Court as subsequently amended; and that I shall then and there move the Supreme Court of the United States for such other and further relief in the premises as may be just. A copy of the brief for the appellants, which I shall then submit, is herewith served upon you.

New York, March 21st, 1903.

Yours, &c.,

ROGER FOSTER,

Counsel for Complainants-Appellants,

35 Wall Street,

New York.

To Hon. George L. Rives,

Counsel to the Corporation,

Solicitor for Defendants, Respondents, the City of New York, Robert A. Van Wyck, individually and as Mayor of said City, Bird S. Coler, individually and as Comptroller of said City.

Messrs. Boardman, Platt & Soley

and Edward M. Shepard, Esq.,

Solicitors for Defendants, Respondents Orr, Starin, Langdon, Rives, Smith and Jesup, individually and as Rapid Transit Commissioners.

Messrs. Strong & Cadwalader,

Solicitors for Defendants, Respondents Rapid Transit Subway Construction Company.

Messrs. Nicoll, Anable & Lindsay,

Solicitors for Defendant Respondent John B. McDonald.

SUPREME COURT OF THE UNITED STATES.

THE UNDERGROUND RAILROAD OF THE CITY OF NEW YORK AND THE RAPID TRANSIT UNDERGROUND RAILROAD COMPANY,
Complainants, Appellants,
against
THE CITY OF NEW YORK, ROBERT A. VAN WYCK, individually and as Mayor of the City of New York; BIRD S. COLER, individually and as Comptroller of the City of New York; ALBERT E. ORR, JOHN H. STARIN, WOODBURY LANGDON, GEORGE L. RIVES, CHARLES L. SMITH, AND MORRIS K. JESSUP, individually and as members of the pretended Board of Rapid Transit Commissioners of the City of New York, JOHN B. MCDONALD AND THE RAPID TRANSIT SUBWAY CONSTRUCTION COMPANY,
Defendants, Respondents.

Submission and Motion.

And now come the appellants, the Underground Railroad of the City of New York and the Rapid Transit Underground Railroad Company, by Roger Foster their attorney, and submit their appeals herein in accordance with the order of this Court of December 8th, 1902, and move this Court for such other and further relief in the premises as may be just.

Washington, District of Columbia, April 20, 1903.

ROGER FOSTER,
Counsel for Appellants.